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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1327

JESSE R. OLDS . . . . . Petitioner

versus

PENNSALT CHEMICALS CORPORATION - Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1227

JESSE R. OLDS - - - - - *Petitioner*

v.

PENNSALT CHEMICALS CORPORATION - *Respondent*

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May it please the Court:

STATEMENT

In May, 1966, the respondent herein entered into a written contract with the "Pip" Johnson Construction Company of Calvert City, Kentucky, whereby Johnson, for costs plus a fixed fee, agreed to erect and install on the property of the respondent a building and certain equipment and appurtenances necessary to enable respondent to carry on its business. The building and equipment were erected and installed according to plans and specifications submitted and made a part of the contract (Appendix 15a).[1] The Contractor was to

[1]References are to the Appendix filed with the Sixth Circuit Court of Appeals, and are a part of the record in this case, unless otherwise indicated.

furnish all labor and materials and to have complete control of the construction site. The respondent had the right and did have at the location of the work, its construction engineer.

Among those employed by the Construction Company was the petitioner, Jesse R. Olds, who was employed as a pipefitter, and about noon on February 23, 1967 petitioner sustained personal injury by accident that arose out of and in the course of his employment with the Construction Company. Precluded from suing the Construction Company by the Workmen's Compensation Act of Kentucky, *Kentucky Revised Statute Chapter 342*, he filed this action against the respondent pursuant to *KRS 342.055*, alleging the defendant-respondent to be a third party wrongdoer and liable for his damages. At the conclusion of all of the evidence the Court sustained the respondent's motion for a directed verdict and dismissed the petitioner's complaint against the respondent.

It is and was respondent's contention that the trial court acted correctly in sustaining the motion for directed verdict. There was no evidence that the Construction Company was not an independent contractor, nor that the respondent had any duty to exercise any control over the construction of the facility, including the maintenance of proper safety practices, and finally that there is substantially no difference between Federal standards and Kentucky standards governing the proper basis for taking a tort action from the jury.

ARGUMENT

1. The Act of the Trial Court in a Diversity Suit Arising Under the Common Law of the State in Directing a Verdict for the Defendant Does Not Violate the Seventh Amendment to the Constitution of the United States, Nor Paragraph 7 of the Bill of Rights to the Constitution of Kentucky.

It would seem to be established that the act of directing a verdict in a proper case being tried in the Federal Courts does not do violence to the Seventh Amendment of the Constitution of the United States, nor of course, to the Constitution of Kentucky, or its Bill of Rights.

In *5 Moore's Federal Practice, Second Edition*, page 2320, ¶50.02, Moore had this to say concerning this question:

> "Until Brady v. Southern Railroad (1943) (320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239) was decided by the Supreme Court in 1943, the federal courts had not clearly opted between the standard that permitted a court to direct a verdict on the basis of a strong preponderance of the evidence and the 'reasonable man' type of standard indicated above. In the *Brady* case the Court announced the standard in the following terms:
>
> > 'When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the

trial the result is saved from the mischance of speculation over legally unfounded claims.'

"Since that time, although they have used many different formulations, the federal courts have been reasonably consistent in the application of the *Brady* rule, that a verdict may properly be directed when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict."

In the same text, *5 Moore's Federal Practice*, Second Edition, page 2330, ¶50.02[2], Moore discusses the constitutionality of standards for directed verdicts and had this to say:

"Repeated challenges have been made that the directed verdict procedure and standards, as heretofore described, violated the Seventh Amendment's guaranty of a right to trial by jury. The issue would seem definitely foreclosed by the decision of the Supreme Court in *Galloway* v. *United States* (1943), (319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458), where a divided Court sustained the validity of the use of the directed verdict. Mr. Justice Rutledge, speaking for the Court, ruled:

'If the intention is to claim generally that the amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Pro-

> cedure. Cf. Rule 50; *Berry* v. *United States*, 312 U. S. 450. The objection therefore comes too late'."

Some of the many cases cited by Moore arise under the Federal Employers Liability Act, a federal statute, and a situation where the federal courts maintain a different standard than those cases arising under the common law.

The court, in the case of *Boeing Company* v. *Shipman*, 411 F. 2d 365 at pages 374, 375, which case is cited and relied on by the petitioner, the Fifth Circuit laid down the following standards:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. . . . A mere scintilla of evidence is insufficient to present a question for the jury."

The Kentucky Court of Appeals abolished the scintilla rule in Kentucky in the case of *Nugent* v. *Nugent's Ex'r*, 281 Ky. 263, 135 S. W. 2d 877, and at page 883 gave the following as the Kentucky rule to be applied in cases of motions for directed verdict or judgment notwithstanding the verdict:

> "When the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but should direct a verdict for the defendant."

This is still the rule in Kentucky. See *Donahue* v. *Simms*, Ky., 419 S. W. 2d 154, at page 158.

2. The Owner of the Premises and the Contractee, Pennsalt Chemicals Corporation, Is Not Liable for Injuries Sustained at the Construction Site by an Employee of the Independent Contractor, Johnson, Unless the Work Being Done by the Independent Contractor Is a Nuisance or Results in a Nuisance, or the Instrumentality for Doing It Is Inherently Dangerous.

The petitioner, in his complaint (Appendix 4a) charges the respondent with certain specific acts and failure to take certain specific steps. The main thrust of petitioner's request for the issuance of the Writ of Certiorari seems to be based upon the contention that the Construction Company was not an independent contractor.

The rule in Kentucky was stated in the case of *Grogan* v. *United States* (W.D. Ky., 1963), 225 F. Supp. 821 (affirmed 6th Cir. 1965), 341 F. 2d 39. There the trial court held:

> "When an employee of an independent contractor is injured, the owner is liable only when the work done by the independent contractor is a nuisance or inherently dangerous."

The Kentucky Court of Appeals has made the same holding in *Jennings* v. *Vincent's Adm'x*, Ky., 145 S. W. 2d 537 (1940) and *Simmons* v. *Clark Construction Company*, 426 S. W. 2d 930 (1968). Far from there being an agreement in the *Simmons* case as contended by petitioner, the Court made a finding that the contractor, Clark, was an independent contractor. Therefore no cause of action would lie against the owner.

If Certiorari is granted as petitioned for herein, this Court of necessity is going to have to review the evidence produced at the trial of the case to determine whether or not the relationship of independent contractor existed between the respondent and Johnson Construction Company, and whether or not, even if that was true, the petitioner would be entitled to recover from the respondent here. There was absolutely no evidence that the work being done by Johnson Construction Company was in itself a nuisance nor that the instrumentality for doing the work was inherently dangerous, and the Kentucky court has held where work is not a nuisance and not inherently dangerous the owner is not liable. *Simmons* v. *Clark Construction Company, supra.*

In addition to the evidence of the petitioner herein, some of the fellow employees of petitioner, whose evidence does not appear in the Appendix, but is in the transcript of the evidence, testified and none testified that the respondent at any time attempted to direct the work or tell them what to do or not to do. The respondent's construction engineer, Carnahan, testified (p.

89a) that he did not as construction engineer have the right or duty to direct how the work was to be done in the performance of the contract or to employ the workers. The head of Johnson Construction Company testified that his company had charge of the construction work, the employment of the employees, and their direction (p. 98a). The evidence of these two witnesses was not repudiated or denied by any evidence introduced by the petitioner herein. The evidence simply comes down to the fact that the petitioner, as plaintiff below, did not prove by any reliable probative evidence or for that matter at all, that the relationship of independent contractor did not exist between the Construction Company and this respondent, and certainly did not prove or even attempt to prove, that this respondent was in any manner negligent so as to cause the petitioner's injuries.

It is not established that the respondent, as owner, had the right or duty to direct how the work was to be done nor did it attempt to so direct the work or the Construction Company's employees.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied for the reasons heretofore given, and that the judgments of the lower courts be affirmed.

Respectfully submitted,

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Paducah, Kentucky 42001

Attorneys for Respondent

CERTIFICATION

I, Thomas J. Marshall, counsel for Pennsalt Chemicals Corporation in the above styled matter, Jesse R. Olds v. Pennsalt Chemicals Corporation, do hereby certify that I served a true copy of the respondent's Brief opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the petitioner on March 24, 1971, by depositing same in the United States mail box with first class postage prepaid, addressed respectively to Charles A. Williams, Century Building, Paducah, Kentucky 42001, and to Messrs, Neely and Reed, 238 North Seventh Street, Mayfield, Kentucky, counsel of record for the petitioner herein.

THOMAS J. MARSHALL,
One of the Attorneys for Pennsalt Chemicals Corporation